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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1069

IMPARATO STEVEDORING CORPORATION,
Petitioner,

v.

UNITED STATES LINES COMPANY,
Respondent.

MOTION AND BRIEF FOR *AMICUS CURIAE*, THE NATIONAL ASSOCIATION OF STEVEDORES, FILED IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

TO THE HONORABLE THE CHIEF JUSTICES OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The National Association of Stevedores respectfully moves this Court, pursuant to Rule 42 (1) of the Revised Rules (1954) for leave to file the accompanying brief as *amicus curiae*. The consent of the petitioner has been obtained. The consent of the respondent was requested but refused.

The interests of the movant in this case and its reasons for requesting leave to file the accompanying brief *amicus curiae* appear below.

Movant is a non-profit trade association composed of 99 firms engaged in stevedoring operations in 39 ports of the United States, including all major East, West and Gulf Coast seaports. The Association's home office is in New York. It has regional offices in Baltimore, Charleston, Cleveland, Honolulu, Mobile and Seattle. Most, if not all, of the principal stevedoring concerns in the United States are members.

Between 70% and 80% of the nation's 150,000 shoremen are employed by the Association's members. These members handled about 70% of all of the cargo lifted in this country.

The interest of the Association and of each of its members is seriously affected by the decision below in that in the field of actions for indemnity arising out of injuries to longshoremen the opportunity and right to present a defense by the stevedore has been denied. Put another way, the decision below has enunciated a rule which prevents a stevedore from offering evidence to show that he fulfilled the obligations imposed upon him by law in the performance of his work. This constitutes a deprivation of property without due process in violation of the constitutional rights of each of the Association's members. The total effect of this rule of law will be a staggering financial burden upon the stevedoring industry. Once again, we have an example of a rule which, instead of tending to prevent and reduce the number of accidents, actually encourages carelessness on the part of shipowners, thereby increasing the accident rate and, thus the financial burden which stevedores will be obliged to shoulder.

The Association believes that the entire shipping industry, shipowners, stevedores and longshoremen, will benefit by a reversal of the decision below in that the constitutional right of due process will be preserved and safety in this hazardous industry will be encouraged.

Movant, accordingly, requests leave to file the accompanying brief so that these issues which are of great importance to the stevedore and shipping industries can be presented to the Court.

Respectfully submitted,

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May 29, 1963

BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS *AMICUS CURIAE*

Facts Pertinent To This Brief

The basic facts have been set forth in petitioner's brief and it is not necessary to repeat them here. There are, however, other pertinent facts and, in particular, on the findings of the trial court relating to the issues between petitioner and respondent which the National Association of Stevedores as Amicus feels should be presented to the Court and, accordingly are contained in its brief.

The interest of the National Association of Stevedores as *Amicus Curiae.*

The National Association of Stevedores is a non-profit trade organization of 99 firms engaged in stevedoring operations in 39 ports of the United States, including all major East, West and Gulf Coast seaports. The Association's home office is in New York. It has regional offices in Baltimore, Charleston, Cleveland, Honolulu, Mobile and Seattle. Most, if not all, of the principal stevedoring concerns in the United States are members.

Between 70% and 80% of the nation's 150,000 longshoremen are employed by the Association's members. These members handle about 70% of all of the cargo lifted in this country.

The interest of the Association in this case is as follows:

1. The individual and direct concern of the members of the Association with the preservation of the right to due process in indemnity actions arising out of personal injuries to longshoremen in which type of action each of the Association's members is constantly engaged.

2. The economic concern that the decision below, depriving stevedores in indemnity actions of the opportunity to present a defense, will place upon them financial burdens of staggering proportions never anticipated or planned for.

3. The moral concern that the health and well-being of those engaged in the shipping industry and, in particular, longshoremen, will be adversely affected and seriously so, by a rule of law such as that created by the decision below in that shipowners being granted what amounts to automatic indemnity will have little or no concern for fostering safety and thus, deterring accidents.

ARGUMENT

The Court of Appeals erroneously redetermined facts found by the trier of fact below upon the basis of substantial evidence and deprived the stevedore of the benefits of due process of law by precluding him from contesting the very issues upon which his liability, if any, was based.

The District Court, the trier of fact as to the indemnity issue, [App. 19a][1] specifically found that, with respect to the injuries sustained by the plaintiff in the basic action, the stevedore had not breached its warranty of workmanlike service [App. 205a].

The reversal of this holding by the Court of Appeals was assertedly posited on the view of that court that the jury's finding of liability on the shipowner determined the issues to such an extent that the shipowner was entitled to indemnification as a matter of law.[2] It is respectfully submitted that the Court of Appeals erred by virtue of a basic misconception of the source and nature of the stevedore's liability to indemnify under the decisions promulgated by this Court.

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[1] Officially reported at 202 F. Supp. 600.

[2] Officially reported at 311 F 2d 413.

It is fundamental that no judicially enforced liability arises unless there has first occurred the breach by one party of some discernable and definable duty—be that duty imposed by law, assumed by contract or a combination of both.[3]

However, it is equally fundamental that differing relationships and differing sources of liability require the application of differing criteria to determine the existence or non-existence of that liability.[4]

In the basic relationship between the vessel owner and the shore-based maritime worker doing traditional seamen's work, the ship has been held to the absolute and non-delegable obligation of providing a seaworthy vessel.[5] On the other hand, the relationship between the vessel owner and the independent stevedoring contractor is such as to have been held to make operative a different obligation, the warranty of workmanlike service.[6]

The error of the Courts of Appeals in the case at bar lay in its failure to give proper effect to the distinction between the two basic founts of liability involved, in its fail-

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[3] "(A) cause of action, in its legal and logical significance, is . . . ; an act or wrong which gives rise to a remedied liability which depends upon the existence of a legal duty binding upon defendant and unfulfilled by him, the branch thereof being the reasonable and probable consequences of the breach of duty."
1 C. J. S. "Action", Sect. 8 (f) p. 985.

[4] *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 76 S. Ct. 232.

[5] *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U. S. 85; *Alaska Steamship Company* v. *Petterson*, 347 U. S. 396, rehearing denied 347 U. S. 994.

[6] *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124; *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co. Inc.*, 355 U. S. 563; *Crumady* v. *The S/S Jodchin Hendrik Fisser et al.*, 358 U. S. 423; *Waterman Steamship Corp.* v. *Dugan & McNamara, Inc.*, 364 U. S. 421; *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd. et al.*, 369 U. S. 355.

ure to distinguish between the responsibilities imposed by the warranty of seaworthiness on one hand and the warranty of workmanlike service on the other.

The duty incumbent on the shipowner to furnish a seaworthy vessel:

1. is non-delegable.

2. is absolute.

3. does not depend upon traditional concepts of fault or negligence.

4. does not depend upon a showing of notice or knowledge of the condition involved.

5. does not depend upon a showing of "reasonableness".

6. may often be inferred by the jury from the mere happening of the event.[7]

The warranty of workmanlike service, on the contrary, however,

1. does depend upon concepts of "reasonableness" or "unreasonableness".[8]

2. does require some notice or knowledge to render the stevedore liable.[9]

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[7] *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539; *United New York and New Jersey Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U. S. 613; *Boudoin* v. *Lykes Brothers Steamship Co., Inc.*, 348 U. S. 336; *Alaska Steamship Company Inc.* v. *Petterson*, 347 U. S. 396; *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406; *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96.

[8] Thus Ryan speaks of the stevedore's obligation "to stow the cargo in a reasonably safe manner." 350 U. S. 124, 132 Atlantic Gulf says "When the District Court charged that in determining petitioner's contractual obligation, the jury should decide 'whether or not there was a reasonably safe discharge' of the cargo", . . . 369 U. S. 355, 363.

[9] *Ignatyuk* v. *Tramp Chartering Corp.*, 2 Cir., 250 F. 2d 198; *Ferrigno* v. *Ocean Transport Ltd.*, 2 Cir., 309 F. 2d 445; *Calderola* v. *Cunard Steamship Company*, 2 Cir., 279 F. 2d 475.

3. is not to be presumed breached from the mere happening of an accident aboard ship during the course of stevedoring operations.

Here, the testimony given before the jury clearly shows that the condition of stowage with which the stevedore was faced (though not of the stevedore's making) was less than ideal.

All agree that stevedoring is, per se, a hazardous industry and one in which the accident rate exceeds the national norm. Thus, the mere opening of a ship's hatch, necessary to the discharge of cargo, brings into the realm of potentiality the chance that someone might fall into the hold thus uncovered, the use of a cargo hook raises the possibility that someone may be struck by that hook, etc., etc. Examples might be multiplied endlessly. Yet no one suggests that the mere occupation by the stevedore in an industrial area of operation more dangerous than most should make it the insurer of those for whom it performs its services. Or at least amicus hopes that no one suggests this although the interpretation, or rather misinterpretation, of some of the language of this Court raised a nagging suspicion that this, in effect, is exactly what some of the inferior courts unwittingly perhaps are bringing about.

At any rate, the Second Circuit would appear to have held, in its decision below, that the mere election of the stevedore to proceed with the work for which it has been hired is sufficient to render it liable to fully indemnify the shipowner no matter what the actual cause of the accident might have been and no matter at whose door the practical layman might lay the ultimate responsibility for the injury to the worker. We will assume, *arguendo*, the existence of this remarkable policy as a rule of law applicable in this matter.

But, if we say that every time that an accident occurs aboard ship involving a condition later determined by a jury to be unseaworthy, the stevedore is thereby rendered liable to indemnify the shipowner, we make a mockery both

of the prior pronouncements of this Court and of traditional principles of indemnification. This, we submit, is the exact import of the decision of the Court of Appeals herein.

Each time the stevedore goes aboard a vessel to perform the work for which it was hired, it must (if we accept the scope of obligation imposed by the Second Circuit) make a decision as to the prospective safety of performance under the conditions then and there obtaining. Obviously, on some occasions conditions will be presented that will appear to be relatively safe. On other occasions, undue and excessive hazards will be readily apparent.

But upon still other occasions, the conditions presented will not be so clearcut and will be on the borderline between undue peril and reasonable safety.

In judging "reasonableness" foresight is the clear criterion—not hindsight.[10] Thus in determining whether or not the stevedore had performed its obligations in a satisfactory manner, the trier of fact was compelled to evaluate whatever dangers were apparent to the stevedore, what could have been done, and what was done, to minimize those dangers and whether, after taking maximum safety precautions, the stevedore was nonetheless "unreasonable" in pursuing the work at all.

The determination of "reasonableness" is a factual question under our system of jurisprudence. In this case, the trier of fact was Judge Bruchhausen, the District Court judge. The personal reactions of an appellate tribunal should play no role in the assessment of the legal rectitude of a determination by the trier of fact as to matters peculiarly factual:

> "We might agree with the Court of Appeals had the question of fact been left to us. But neither we nor the Court of Appeals can so determine facts found by the jury any more then the District Court can predetermine them."
>
> *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U. S. 355, 358, 359.

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[10] *Damanti* v. *A/S Inger*, 314 F. 2d 395.

That the trier of fact herein was a judge—not a jury—does not alter the basic rule that the Court of Appeals does not determine facts *de novo*. *McAllister* v. *U. S.*, 348 U. S. 119; *Guzman* v. *Pichirilo*, 369 U. S. 698.

The decision of the Court of Appeals completely neglects the possibility that the proximate cause of the plaintiff's injury, as found by the jury might well have been a latent condition of improper stowage as to this particular crate which formed a portion of plaintiff's work surface. It (the proximate cause) might well have been the latently defective condition of the crate onto which plaintiff stepped (the condition which Judge Bruchhausen found to have actually been the proximate cause of the accident). It might have been some condition not sufficiently patent to charge the stevedore with notice but sufficiently dangerous to render the vessel unseaworthy.

In the presence of varying grounds of possible ship liability, this Court has plainly declared that it is not the function of an Appellate Court to pick and choose among those grounds to select one which will sustain the imposition of third party liability upon the stevedore. *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd. et al.*, 369 US 355.

The function of a trial court (sitting without a jury) is the determination of the facts upon which legal conclusions are to operate. Judge Bruchhausen found as facts:

> A. The third party defendant stevedore had no notice, actual or constructive, of the condition of the individual cartons and crated themselves and did not have any knowledge of any latent defects (F. F. 10).
>
> B. No warnings of possible defects in individual crates was given to the third party defendant stevedore at any time by the defendant shipowner (F. F. 11).

C. No dunnage was used for flooring in the No. 1 hatch and testimony disclosed that the main purpose of dunnage would be to insure a dry cargo and that this type of cargo in the No. 1 hatch does not necessarily require dunnage for proper stowage (F. F. 16).

D. Some of the individual crates within this cargo were wobbly (F. F. 17).

E. The disarray and wobble were found only in isolated occasions (F. F. 22).

F. That it is the customary, normal, accepted and safe stevedoring practice in the Port of New York to walk atop cargo of the type involved during discharging operations (F. F. 25).

G. The longshoremen faced with a condition of wobbly stowage acted reasonably in forming the bucket brigade to eliminate as much activity as possible (F. F. 39).

H. The defendant stevedore performed the discharging operation in a reasonable and workmanlike fashion (F. F. 41).

In his written opinion Judge Bruchhausen concluded:

"Under these circumstances there was no breach of the stevedore's warranty of workmanlike services."

It should seem obvious that the jury, in passing upon the basic issues between plaintiff and shipowner, had absolutely no interest in whether or not stevedoring services were performed in a reasonable manner. Accordingly, no testimony as to the propriety or impropriety of the stevedore's work was submitted to the jury.

Any testimony relevant to the essential issue (as between shipowner and stevedore) of the adequacy and "reasonableness" of the stevedore's performance was heard

only before the judge. Thus the appellate's court's bald observation, "Inconsistent determinations based on the same evidence at the same trial are logically impossible", is completely inappropriate when it is borne in mind that the basic action and the third party action involved 1) a different ground of liability 2) different issues 3) different (or at least additional) evidence.

It we accord the holding of the Second Circuit its proper logical effect, then any stevedore's testimony on the indemnity phase of the trial is rendered completely nugatory since the issues have been finally and fully concluded by the resolution of the plaintiff's claim.

If the stevedore is denied the opportunity of presenting evidence of proper performance *after* the main issues have been concluded, may it not, then, introduce evidence as to its compliance with its warranty of workmanlike service *prior* to the conclusion of the main part of the trial? If so, for the plaintiff's attorney would urge, and rightly so, that he had no claim against the stevedore and such evidence had no place in the resolution of the issues between worker and shipowner.

If the stevedore's evidence is to be given no effect *after* the conclusion of plaintiff's action, and if stevedore's evidence is to be granted no foothold *before* the conclusion of the basic action, when *does* the stevedore receive an opportunity to demonstrate that which his ultimate liability or non liability is said to depend, the workmanlike performance of his service? Or is his testimony as to the quality of his performance of no legal significance — the granting of indemnity being automatic?

The consequences of the widespread adoption of the rule here announced by the Second Circuit are horrifying and devoid of judicial respect for the constitutional rights of a major American industry.

Conclusion

The decision below should be reversed for the reasons urged by petitioner and for the reasons urged in this brief. In particular, the Association feels that the rule of law promulgated by the Court of Appeals herein threatens a major American industry with the deprivation of its property without the benefit of any opportunity to contest its alleged liability in a court of law.

Respectfully submitted,

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